Supreme Court, U.S.
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No.: 00-462

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,
Petitioner,

vs.

WILL PERKINS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Did the state supreme court err in ruling that, when an officer illegally stopped a car, the officer's "post-stop observation of the defendant behind the wheel must be suppressed"?

Does the petition present a controversy under Article III at bar, given that petitioner argued below that evidence that respondent was driving was subject to suppression, the state supreme court ruled that such evidence was to be suppressed, and without such evidence petitioner could not obtain a conviction?

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UNITED STATES CONSTITUTION

Amendment IV 1
Article III. 1, 5, 6

JURISDICTION

The state supreme court entered it decision on 27 April 2000, and denied petitioner's motion for clarification on 12 June 2000.[1] Hence, the petition was timely filed. As discussed below, respondent submits that the Court lacks Article III jurisdiction.

PROVISIONS OF LAW INVOLVED

Article III of the Constitution provides in pertinent part:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ... .

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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[1] Contrary to the statement in the petition, petitioner did not move for rehearing in the state supreme court.

STATEMENT

Petitioner, the State of Florida, presented a narrow issue to the state supreme court. Petitioner summarized its own argument as follows in its Motion for Clarification below (appendix to petition, A-12):

> At oral argument, the State conceded that where a search and seizure is unlawful, some item of evidence must be suppressed if the exclusionary rule ... is to be enforced. However, the State argued that the defendant's driving record could not be suppressed. [Cit.] The State further argued that identity itself, that is, the physical features of the defendant linked to his name, was not an item of evidence which could be suppressed. [Cit.] The State therefore argued that, based on the circumstances, the only item of evidence which was 'suppressible' was the observation by the police officer of the fact of the defendant's driving.

"The State suggests in its brief and at oral argument that the fact which should be subject to suppression in this case is that of driving." Perkins v. State, 760 So. 2d 85, 89 (Fla. 2000) (Quince, J., dissenting).

The state supreme court agreed with petitioner's argument in deciding that narrow issue: "we hold that when, as in the instant case, an officer unlawfully stops a defendant solely to determine whether he or she is driving with a suspended license, that officer's post-stop observation of the defendant behind the wheel must be suppressed." Id. 88 (opinion of the court).

ARGUMENT

Petitioner conceded in the state supreme court that "the observation by the police officer of the fact of the defendant's driving" was suppressible. Petitioner's Motion for Clarification below (appendix to petition, A-12). The state supreme court held that the officer's "post-stop observation of the defendant behind the wheel must be suppressed." Perkins v. State, 760 So.2d 85, 88 (Fla. 2000).

The ruling of the state supreme court conforms to this Court's interpretation of the Fourth Amendment. It does not conflict with INS v. Lopez-Mendoza, 468 U.S. 1032 (1984). Having conceded the issue below, petitioner now seeks an advisory opinion from the Court on a question not at issue in the state supreme court.

In Murray v. United States, 487 U.S. 533, 536-37 (1988), the Court wrote (e.s.):

> The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search, Weeks v. United States, 232 U.S. 383 (1914), and of testimony concerning knowledge acquired during an unlawful search, Silverman v. United States, 365 U.S. 505 (1961). Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes "so attenuated as to dissipate the taint," Nardone v. United States, 308 U.S. 338 (1939). See Wong Sun v.

United States, 371 U.S. 471, 484-485, 83 S.Ct. 407, 415-16, 9 L.Ed.2d 441 (1963).

Of course, the same rule applies to observations made, and knowledge acquired, during an illegal stop. "[T]estimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies. McGinnis v. United States, 1 Cir., 227 F.2d 598." Wong Sun, 371 U.S. at 485; Johnson v. State, 878 S.W.2d 164, 168 (Tex. Crim. App. 1994) (quoting Wong Sun).

In United States v. Brignoni-Ponce, 422 U.S. 873 (1975), Border Patrol officers illegally stopped Brignoni-Ponce's car because the occupants appeared to be of Mexican descent. Questioning revealed that the passengers were illegal aliens. Charged with transporting aliens, Brignoni-Ponce moved to suppress "the testimony of and about the two passengers" in the car. This Court questioned "whether voluntary testimony of a witness at trial as opposed to a Government agent's testimony about objects seized or statements overheard, is subject to suppression as the fruit of an illegal search or seizure", id. 876, n. 2 (e.s.), but did not address the question because it was not raised in the petition. The Court went on to hold that the stop was illegal and the trial court should have granted the motion to suppress.

Under Murray, Wong Sun and United States v. Brignoni-Ponce, the state supreme court reached the correct result at bar.

The state supreme court held inadmissible testimony as to the officer's "post-stop observation of the defendant behind the wheel". Testimony as to the officer's post-stop observation of the defendant behind the wheel was suppressible as "knowledge obtained" or "matters observed" during the illegal stop. Such testimony parallels the suppressible testimony "about the two passengers" in Brignoni-Ponce's car.

Notwithstanding the foregoing, the petition argues, largely on the basis of a single sentence taken out of context in INS v. Lopez-Mendoza, 468 U.S. 1032 (1984), that the Court should "summarily reverse" the state supreme court's decision.

In INS v. Lopez-Mendoza, Adan Lopez-Mendoza and Elias Sandoval-Sanchez challenged deportation orders entered against them in separate proceedings. At his deportation hearing, Lopez-Mendoza's "counsel moved to terminate the proceeding on the ground that Lopez-Mendoza had been arrested illegally." Id. 1035. He did not challenge any evidence entered at the hearing. The judge ruled that the legality of the arrest was an irrelevant issue. Dismissing his subsequent appeal, the BIA ruled that the "mere fact of an illegal arrest has no bearing on a subsequent deportation

proceeding." Id. 1036. The Court of Appeals reversed the BIA's decision, and the Court granted certiorari.

The Court disposed of Lopez-Mendoza's claims as follows:

> The "body" or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred. See Gerstein v. Pugh, 420 U.S. 103, 119 (1975); Frisbie v. Collins, 342 U.S. 519, 522 (1952); United States ex rel. Bilokumsky v. Tod, supra, 263 U.S., at 158. A similar rule applies in forfeiture proceedings directed against contraband or forfeitable property. See, e.g., United States v. Eighty-Eight Thousand, Five Hundred Dollars, 671 F.2d 293 (CA8 1982); United States v. One (1) 1971 Harley-Davidson Motorcycle, 508 F.2d 351 (CA9 1974); United States v. One 1965 Buick, 397 F.2d 782 (CA6 1968).
>
> On this basis alone the Court of Appeals' decision as to respondent Lopez-Mendoza must be reversed. At his deportation hearing Lopez-Mendoza objected only to the fact that he had been summoned to a deportation hearing following an unlawful arrest; he entered no objection to the evidence offered against him. The BIA correctly ruled that "[t]he mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding." [FN concerning possible procedural default omitted] In re Lopez-Mendoza, No. A22452208 (BIA, Sept. 19, 1979, reprinted in App. to Pet. for Cert. 102a.

Id. 1039-40. In Gerstein, the Court ruled that a judicial hearing is not a prerequisite to prosecution by information, noting "the established rule that illegal arrest or detention does not void a subsequent conviction." 420 U.S. at 119. In Frisbie, the Court wrote: "This Court has never departed from the rule ... that the

power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a 'forcible abduction.'" 342 U.S. at 522. United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 158 (1923) states: "Irregularities on the part of the government official prior to, or in connection with, the arrest would not necessarily invalidate later proceedings in all respects conformable to law."

Considering INS v. Lopez-Mendoza, especially in light of the cases cited for the proposition in question, one sees that the Court was simply adhering to the rule that an illegal arrest does not automatically invalidate a subsequent prosecution. Lopez-Mendoza did not try to exclude any evidence resulting from the illegal arrest, and so the Court's discussion of his claim did not consider whether identification testimony could be suppressed.[2]

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[2] In fact, courts suppress identification testimony in various circumstances. See United States v. Wade, 388 U.S. 318 (1967) (lineup conducted without presence of counsel), Stovall v. Denno, 388 U.S. 293 (1967) (suggestive identification procedure), Moore v. Illinois, 434 U.S. 220 (1977) (identification at hearing without counsel), and Davis v. Mississippi, 394 U.S. 721 (1969) (fingerprints obtained during an illegal detention). Thus, United States v. Crews, 445 U.S. 463, 472-73 (1980), held that the defendant's illegal arrest did not bar the victim's identification testimony only because the victim had seen the defendant at the time of the crime, and was not affected by the subsequent illegal arrest.

Petitioner does not explain how the foregoing proposition applies to the case at bar, much less why it requires summary reversal of the state supreme court's decision.

This Court's treatment of the other petitioner in INS v. Lopez-Mendoza, Sandoval-Sanchez, also does not help petitioner. At his deportation proceeding, Sandoval-Sanchez sought to suppress statements obtained as a result of his arrest.

The Court of Appeals held that his detention violated the Fourth Amendment, that the statements he made were a product of that detention, and that the exclusionary rule barred their use in a deportation hearing. 468 U.S. at 1038.

Reversing, the Court held that "evidence derived from [illegal] arrests need not be suppressed in an INS civil deportation hearing." 468 U.S. at 1051. In reaching this result, the Court listed various factors which significantly reduced "the likely deterrent value of the exclusionary rule in a civil deportation proceeding." Id. 1043. First among these was the fact that, regardless of the legality of the arrest, deportation was still possible if evidence not derived from the arrest was sufficient to support deportation. In a deportation hearing, the Government has only to prove identity and alienage, and because, as discussed regarding Lopez-Mendoza, "the person and identity of the

respondent are not themselves suppressible, see supra, the INS must prove only alienage, and that will sometimes be possible using evidence gathered independently of, or sufficiently attenuated from, the original arrest." Id. Again, the Court was simply noting that, once he was before the immigration Judge, Sandoval-Sanchez could not contest his identity as Elias Sandoval-Sanchez. This observation does not stand for the proposition that, in a criminal case, the court must admit identification evidence without regard to its provenance.

At bar, the only evidence that appellant was driving the car - a necessary element of the offense of driving with a suspended license - came from the illegal stop. And, as petitioner agreed below, the evidence that he was driving was subject to suppression.

Thus, petitioner now seems to seek an advisory opinion on an issue as to which no ongoing case or controversy exists. The state supreme court ruled that, as the state conceded, the evidence that Will Perkins was driving the car is to be suppressed. With no controversy on this issue, the Court lacks Article III jurisdiction. "'The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy,' and 'a federal court [lacks] the power to render advisory opinions.' Preiser v. Newkirk, 422 U.S. 395, 401 (1975); see also Flast

v. Cohen, 392 U.S. 83, 97 (1968)." United States Nat'l Bank of Oregon v. Ind. Ins. Agents of American, Inc., 508 U.S. 439, 446 (1993). Federal courts may not "give opinions upon moot questions". Mills v. Green, 159 U.S. 651, 653 (1895), Calderon v. Moore, 518 U.S. 149, 150 (1996).

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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